

FRIENDS OF MOON CREEK, an unincorporated association, Cheryl and Robert Balentine, George A. and Jane Doe Tyler; Douglas M. and Jane Doe Anderson; Tom and Michele Bowyer Joe F. and Jane Doe Struther; Mark and Jane Doe Moeser; Gaylan and Jane Doe Warren, and Michael and Jane Doe Jeffrey,

VS.

DIAMOND LAKE IMPROVEMENT,
ASSOCIATION, INC., PHIL ANDERSON,
Director Department of Fish & Wildlife,
SHARON SORBY, Coordinator Pend
Oreille County Noxious Weed Control
Board,

Defendants/Cross-/Counter-Claimants.

ORDER RE: MOTION TO SET ASIDE PRELIMINARY INJUNCTION

I. Introduction and Procedural History

This action was commenced with the filing of a Complaint for Declaratory and Injunctive Relief on November 21, 2013. The parties engaged in extensive motion practice, the Complaint was twice amended, and cross and counter claims were filed. The

1 court heard oral argument on the Motion for Preliminary Injunction and three Motions
2 to Dismiss on January 23, 2014. On February 27, 2014, the court issued an Order
3 denying the Motions to Dismiss. (ECF No. 71). On March 27, 2014, the court issued an
4 Order Granting in Part and Denying in Part (ECF No. 80) Plaintiff's Motion for
5 Preliminary Injunction. The Motion was granted as to only Defendant Diamond Lake
6 Improvement Association ("DLIA") and prohibited DLIA from "entering on to the real
7 property of Plaintiff's members" and taking action pursuant to "the still active HPA
8 [Hydraulic Project Approval] # 127229-03." (ECF No. 80, p. 11).

9 Thereafter, several more motions were presented to this court, including dispositive
10 motions. On February 5, 2015, the court denied Defendant Anderson's, Director of the
11 Washington Department of Fish & Wildlife, Motion for Summary Judgment and also
12 denied Plaintiffs' Cross-Motion for Summary Judgment. (ECF No. 172). On May 13,
13 2015, the court denied DLIA's Motion to Dismiss for Lack of Jurisdiction. (ECF No.
14 205). In a separate Order of May 13, 2015, the court granted in part and denied in part
15 Defendant Sorby's Motion for Summary Judgment and Plaintiffs' Motion for Summary
16 Judgment. (ECF No. 206).

17 Shortly thereafter, on May 19, 2015, Plaintiffs filed a "Complaint for Damages and
18 for Injunctive Relief" in the Superior Court of Pend Oreille County. (Filed herein at ECF
19 No. 214). Defendants then filed a Joint Motion to Stay this action. (ECF No. 213). On
20 August 17, 2015, this court issued an Order granting the Motion to Stay. (ECF No. 216).
21 Defendants contended a stay was in the interests of judicial economy because the state
22 Complaint involved additional claims and sought additional relief and therefore the
23 resolution of this federal action would not resolve all claims presented in the state action.
24 In granting the stay, this court observed: "The primary claim at issue in this case is a state
25 law trespass claim against a private homeowner's association, DLIA." (ECF No. 216, p.
26 3). The court also recognized the interest in judicial economy of having all claims
27 resolved in the state court. The court further observed much discovery and motion

1 practice had already taken place and “it would appear the parties are in a position to
2 request an expedited trial setting in state court.” (*Id.*). The parties represented to this
3 court they should be able to conclude discovery in three to four months. Unfortunately,
4 the interests of judicial economy do not appear to have been served in this matter, as the
5 dispute is now over four years old and has yet to proceed to trial.

6 **A. The State Court Litigation**

7 The parties have filed several status reports informing the court’s understanding
8 of the pendency of the state litigation. The parties scheduled a mediation for February
9 2016, but the mediation was unsuccessful. (ECF No. 224 & 226). The parties then filed
10 dispositive motions in state court and trial was scheduled for May 2, 2017. (ECF No.
11 227). The parties report the claims against Defendant Anderson were dismissed on
12 summary judgment, and Defendant Sorby’s Motion for Summary Judgment based on
13 qualified immunity was denied. (ECF No. 226 & 235). An order certifying the question
14 of qualified immunity to the Washington Court of Appeals was entered, and the court
15 heard oral argument on September 8, 2017. As a result of the certification, the state trial
16 court struck the May 2, 2017, trial date.

17 Defendant DLIA also moved for summary judgment, which was granted in part.
18 DLIA reports it obtained summary judgment on all claims except for a procedural Due
19 Process claim. (ECF No. 244). DLIA obtained a favorable ruling on Plaintiffs’ trespass
20 claim. DLIA reports the trial court denied Plaintiffs’ Motion to Reconsider and request
21 for certification of discretionary review. Plaintiffs’ recent filings confirm the state trial
22 court dismissed Plaintiffs’ trespass claims and denied the request for discretionary
23 review. (ECF No. 251, p. 5).

24 **II. Discussion**

25 DLIA moves for relief from the Preliminary Injunction entered on March 27, 2014,
26 and argues Plaintiffs can no longer demonstrate a likelihood of success on the merits of
27 their trespass claims, because the claims have been adjudicated against them in state

1 court. Plaintiffs argue the state trial court ruling on the trespass claim was erroneous
2 because “the trial court found that substantial damages are now a necessary element of
3 any simple common law trespass claim.” (ECF No. 251, p. 2).

4 A plaintiff seeking preliminary injunction “must establish that he is likely to
5 succeed on the merits, that he is likely to suffer irreparable harm in the absence of
6 preliminary relief, that the balance of the equities tips in his favor, and that an injunction
7 is in the public interest.” *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 21
8 (2008). A preliminary injunction is an “extraordinary remedy” not awarded as of right.
9 *Id.* at 23. In *Winter*, the Supreme Court rejected the Ninth Circuit’s approach which had
10 allowed for an injunction to be entered on the “possibility” of irreparable harm, and stated
11 such harm must be “likely”. As an alternative to demonstrating a likelihood of success
12 on the merits, a movant for a preliminary injunction may establish “serious questions
13 going to the merits, and that the balance of the hardships tips sharply in its favor.” *Soda*
14 *Mountain Wilderness Council v. Bureau of Land Management*, 534 Fed.Appx. 680, 683
15 (9th Cir. 2013); see also *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir.
16 2011). The grant of a preliminary injunction is an exercise of judicial discretion. *Sierra*
17 *On-Line v. Phoenix Software*, 739 F.2d 1415, 1421 (9th Cir. 1984). A preliminary
18 injunction “is not a preliminary adjudication on the merits but rather a device for
19 preserving the status quo and preventing the irreparable loss of rights before judgment.”
20 *Id.* at 1422.

21 After this court heard the Motion for Preliminary Injunction, it determined
22 Plaintiffs had demonstrated a likelihood of success on the merits of the trespass claim.
23 Plaintiffs had presented Declarations supporting the claim. These Declarations included:
24 Cheryl Ballentine submitting she suffered a headache from the herbicide spray (ECF No.
25 4); Gaylen Warren stated the airboat driver threatened/attempted to run him over (ECF
26 No. 6); Mark Moeser stated the beaver pond on his property was destroyed by the
27 Defendants’ activity which dramatically decreased his property value. (ECF No. 7); and

1 Doug Anderson who operates SpruceWood Farms from his 5 acre parcel and sells plants,
2 trees, and shrubs, which he contended were contaminated by the herbicide application.
3 (ECF No. 8). Additionally, Joe Struthers stated he told DLIA they could not use his
4 property as an access point to the beaver dams and called local police about the trespass,
5 but they refused to act. (ECF No. 10). The court found these Declarations, and others,
6 established a likelihood of success on the merits on the trespass claim.

7 This court also noted: “It is well-established that the loss of an interest in real
8 property constitutes an irreparable injury.” *Park Village Tenants Ass’n v. Mortimer*
9 *Howard Trust*, 636 F.3d 1150, 1159 (9th Cir. 2011). This court looked at the balance of
10 the equities and found that although both DLIA and Plaintiffs sought to protect and
11 preserve their respective real property, the equities were in favor of Plaintiffs who alleged
12 their property had been physically invaded by Defendants. The court issued the
13 injunction against only DLIA, and not against Defendant Anderson or Defendant Sorby.
14 The Order stated, in relevant part:

15 Defendant DLIA is hereby prohibited from entering on to the real property of
16 Plaintiff’s members as described further in paragraph (4) below, and is further
17 prohibited from taking further action involving Plaintiffs’ property pursuant to the
18 still active HPA # 127229-03. Any action pursuant to an HPA that could involve
19 Plaintiff’s property shall be taken only after 20 days prior written notice to
20 Plaintiff’s members listed in paragraph (4) or upon receiving express written
permission from such members, or with the consent of the court.

21 DLIA now seeks relief from the Order, or in the alternative, that the court require the
22 posting of a \$1,000,000.00 bond, to cover damages in the event of flooding on DLIA’s
23 members properties.

24 When the Motion to Stay was originally argued, both sides made an argument
25 focused on judicial economy and were concerned about the prospect of piecemeal
26 litigation. However, it appears what the parties sought to avoid has occurred. The parties
27 are litigating the instant Motion in federal court, while a few remaining claims are

1 proceeding to trial in state court, and while yet another issue (qualified immunity) is
2 pending before the Washington Court of Appeals.

3 The four factor preliminary injunction test now weighs in favor of dissolving the
4 injunction. Although Plaintiffs retain the possibility of ultimately prevailing on the
5 trespass claim, given the adverse ruling by the state trial court, they have not established
6 a likelihood of success. As to the second factor, whether Plaintiffs have established they
7 are likely to suffer irreparable harm, this court originally found loss of an interest in real
8 property and environmental injury constitutes irreparable injury. (ECF No. 80, p. 6). In
9 question was whether such future injury was likely to occur. Here, DLIA's Motion
10 indicates that future activity concerning the "drainage ditch" and beaver dams, and
11 potential injury, is likely to occur. DLIA states it has not maintained the "drainage ditch"
12 for years because of this litigation, and the injunction. (ECF No. 244, p. 6). DLIA
13 contends as a result "lake levels have again risen to perilous levels". (*Id.*). DLIA
14 contends the beaver tube must be maintained "at least every three months," and yet
15 presumably it has not been maintained for over three years and flooding has not resulted.
16 (*Id.* at p. 4). Although both Plaintiffs and DLIA allege damage to their real property may
17 result in future, this factor still tips in favor of Plaintiffs as DLIA proposes to clear the
18 "drainage ditch", remove beaver dams, and spray or request spraying of herbicide. (ECF
19 No. 244, p. 17). These are the very actions which precipitated this lawsuit, and which
20 Plaintiffs allege constituted trespass.

21 Concerning the third factor, the balance of the equities, the court originally
22 recognized the property interests of DLIA and Plaintiffs, and they both argued they were
23 acting in the interest of the their own real property. The court found the interests tipped
24 in favor of Plaintiffs "whose members alleged their real property was physically
25 invaded." (ECF No. 80, p. 8). This court's analysis remains the same, although
26 consideration of the state court ruling on the trespass claims weakens the strength of
27 Plaintiffs' allegations. On the fourth factor, the public interest, the court originally found

1 valid public interest concerns on both sides, and maintains that conclusion.

2 **III. Conclusion**

3 The court finds Plaintiffs can no longer establish a likelihood of success on the
4 merits of the state trespass claim, because the trespass claim was been adjudicated against
5 Plaintiffs in state court. While it is true Plaintiffs have not yet had the opportunity to
6 appeal the summary judgment ruling, and Plaintiffs could ultimately prevail on appeal,
7 and then prevail at trial on remand, this court does not find the likelihood of success
8 established. This court expresses no opinion on the merits of the state trial court's ruling
9 on the trespass claims. The state court considered the merits of a state law trespass claim
10 on a presumably more fulsome summary judgment record than the record presented on
11 the preliminary injunction motion and determined the claim against Plaintiffs. The court
12 will dissolve the preliminary injunction Order (ECF No. 80), which has been in effect for
13 over three years.

14 The lifting of the injunction does not affirmatively allow for DLIA members to
15 trespass on Plaintiffs' members property. Additionally, the court observes the Hydraulic
16 Project Approvals ("HPA") which were before the court at the time of the hearing on the
17 Motion for Preliminary Injunction have now expired. The HPAs are found in the record
18 and HPA # 127229-1 expired on June 6, 2017. (ECF No. 4-9). Patrick Chapman, an
19 employee of the Department of Fish and Wildlife, filed a Declaration which addressed
20 the status of five HPAs which had been issued to DLIA. He stated two had been
21 "superseded" and two had "expired". (ECF No. 39-1, ¶ 2(b)). He listed HPA 127229-03
22 as "active" as of December 18, 2013. HPA 127229-3 was attached as an exhibit and
23 states an expiration date of June 5, 2017. (ECF No. 39-1, p. 6).

24 The HPAs which purported to authorize the dredging activities and installation of
25 beaver dam tubes have expired, and the court dissolving the injunction does not authorize
26 such activities on Plaintiffs' members properties. The parties are encouraged to work
27 cooperatively in addressing these matters of dispute concerning lake level, weeds in the

1 creek, beaver dams, etc., and attempt to bring an end to this long-running dispute. As
2 early as its Order of May 7, 2014, this court observed the parties were taking “overly
3 litigious postures”, and further observed “the parties appear poised to expend great time
4 and expense on this litigation”. (ECF No. 101, p. 3-4). The court reminded the parties
5 of “the familiar axiom that a bad settlement is almost always better than a good trial.” (*Id.*
6 at p. 4). Despite the court’s admonition, the parties have continued to litigate this matter
7 for an additional forty-three months, and after litigation in the state trial court, state
8 appellate court, and this court, some claims remain unresolved.

9 **IT IS HEREBY ORDERED:**

10 1. Defendant DLIA’s Motion to Set Aside Preliminary Injunction (ECF No. 244)
11 is **GRANTED IN PART**. The court’s Preliminary Injunction (ECF No. 80) is dissolved
12 **effective January 12, 2018**. However, removing the injunction does not, as set forth
13 below, grant DLIA all the relief sought in the Motion to Set Aside.

14 2. This Order does not affirmatively allow DLIA to undertake action to clear the
15 Diamond Lake “drainage ditch”, access and maintain beaver tubes, remove beaver dams,
16 or to apply herbicide in the ditch. Any such action, if taken, must comply with all
17 applicable federal, state, and local laws. Any such action, if taken, should only be taken
18 after providing appropriate notice to potentially affected nearby property owners. The
19 court encourages DLIA and Plaintiffs to work cooperatively in addressing these issues.
20 In the event the parties cannot reach some agreement, the parties may choose to address
21 this issue with the state court, as the federal action is currently stayed. (See Order at ECF
22 No. 216).

23 **IT IS SO ORDERED.** The Clerk shall enter this Order and furnish copies to
24 counsel.

25 Dated this 28th day of December, 2017.

26 s/ Justin L. Quackenbush
27 JUSTIN L. QUACKENBUSH
28 SENIOR UNITED STATES DISTRICT JUDGE